Supreme Court, U.S.
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No. (1) 02 309

In The

# Supreme Court of the United States

TRAVIS COUNTY LANDFILL COMPANY, L.L.C.,

*Petitioner,*

v.

CITY OF AUSTIN,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Texas**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Do this Court's holdings in *Griggs v. Allegheny County* and *Loretto v. Manhattan Teleprompter CATV Corp.* require the public airport proprietor to acquire an overflight easement over land within the approach / takeoff area where airplanes routinely operate at altitudes below 500 feet while utilizing the runway?

2. Where land within the approach area suffers unquestioned limitations on its use and unchallenged substantial reduction in market value because of overflights, does the decision in *United States v. Causby* prohibit the landowner's inverse condemnation claim?

## LIST OF PARTIES

Petitioner: Travis County Landfill Company, L.L.C. (TCLC) – a Texas Limited Liability Company

Respondent: The City of Austin, Texas, a municipal corporation organized under the Home Rule Amendment of the Texas Constitution

## RULE 29.6 STATEMENT

Travis County Landfill Company, L.L.C. (TCLC) – a Texas Limited Liability Company, has no parent companies or nonwholly owned subsidiaries.

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## OPINIONS BELOW

This Petition asks that the Court review and correct the opinion of the Texas Supreme Court in *City of Austin v. Travis County Landfill Company, L.L.C.*, 73 S.W. 3d 234 (Tex. 2002). The Court's opinion and judgment are reproduced in Appendix pages 1-18.

The Supreme Court reversed an earlier intermediate appellate opinion, *City of Austin v. Travis County Landfill Company, L.L.C.*, 25 S.W. 3d 191 (Tex. App. – Austin 1999). This opinion is reprinted in Appendix pages 20-53.

The case was tried before the Honorable Suzanne Covington, Judge of the 201st District Court of Travis County, Texas. There is no published record of her opinion, but the Findings of Fact and Conclusions of Law supporting it are reproduced in Appendix pages 54-55.

## STATEMENT OF JURISDICTION

The opinion of the Texas Supreme Court was delivered on March 28, 2002. The Petitioner timely filed a Motion for Rehearing which was overruled on May 30, 2002. (App. 57)

From the outset of these proceedings, the Petitioner has alleged that its property has been taken without the payment of adequate compensation in derogation of Constitutional requirements. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## APPLICABLE CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution which provides, in relevant part: " . . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution, Section 1, which provides, in relevant part: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law."

## STATEMENT OF THE CASE

This is an inverse condemnation case. The Petitioner's property is adjacent to Austin-Bergstrom International Airport (ABIA), beneath the final approach zone of the main runway. Virtually all airplanes utilizing the south end of the main runway directly overfly this land. Although the altitude of departing aircraft varies, all landing aircraft are required to observe an FAA mandated glide slope which brings them between 493 and 223 feet above the surface of the TCLC land. By the time of trial, these overflights occurred an average of a hundred times a day. This frequency was expected to increase into the foreseeable future.

When TCLC's predecessor in interest acquired the property, it was subject to an easement granted in 1982 to the United States Air Force. The easement deed is reproduced in Appendix pages 58-67. It conveys overflight rights for a fixed number of military owned or controlled aircraft " . . . **operating at or on Bergstrom Air Force Base.**" (App. 66). It also includes a clearance easement

allowing the pruning of trees and removal of other obstructions which might interfere with overflights. The City concedes that the easement does not privilege overflights by civilian commercial aircraft. Military overflight rights are expressly limited to planes using the former air force base.

In 1991, the Department of Defense ordered Bergstrom Air Force Base closed and the real estate assets there liquidated. Pursuant to an agreement dating back to the creation of the base in 1942, the original land area was returned to the City of Austin. Additional land and easements acquired by the Air Force for expansion of the base, including the easement covering the TCLC property, were subsequently given to the City, subject to restrictions and limitations, under the provisions of the Defense Base Closure and Realignment Act of 1990. 10 U.S.C. § 2687. The City decided to incorporate the existing main runway into the redevelopment of its municipal airport.

The Petitioner's property had previously been granted a permit to operate as a Type IV landfill. Because this use was specifically prohibited in this location by FAA regulations, the City budgeted funds to acquire the permit and entered negotiations with the landowner. Shortly before the airport was to open, the City convinced FAA to relax its outright prohibition and allow limited use of the property for landfill purposes, consistent with the 1982 easement. An assistant City attorney attempted to get the Petitioner to grant an overflight easement authorizing flights by aircraft of all types. TCLC refused and insisted that the City acquire the necessary easement by purchase or condemnation.

When construction at ABIA was completed, the City decided to begin operations with commercial jetliners without the benefit of an easement or the consent of TCLC. About the time overflights commenced, this suit was filed, alleging an unconstitutional taking of the Petitioner's property under this Court's precedents, *Griggs v. Allegheny County*, 369 U.S. 84 (1962) and *United States v. Causby*, 328 U.S. 256 (1946).

The trial evidence was largely undisputed. City witnesses admitted the frequency and altitude of overflights and the likelihood of increased flights in the foreseeable future. Because of a local shortage of landfill space, every witness who testified on the subject agreed that but for the ABIA project, the TCLC permit would have been expanded by 1.7 million cubic yards. Each witness who testified on the subject also agreed that the increased risk and operating cost brought about by the low overflights contributed to a reduction in the fair market value of the subject property. The City's assistant director of solid waste services admitted that both the subject property and the City's adjacent landfill were adversely affected by their proximity to the airport. Each party presented appraisal testimony based upon the "before and after" test of market value. Both appraisers concluded to a before-taking value of $9,800,000. The City's expert estimated a reduction in fair market value of $2,300,000. The landowner's expert estimated damages at $3,600,000.

The jury found liability and damages in the amount of $2,950,000. The trial court made its own findings of fact and conclusions of law in support of its independent liability finding and rendered judgment for the Petitioner. This appeal resulted. At all stages of these proceedings, including those before the Texas Supreme Court, the

parties and courts have assumed that the protections afforded by the Texas and United States Constitutions through their "takings" clauses are congruent. (App. 5, 6).

As a condition to obtaining transfer of the military overflight easement, the City was required to make a verified representation to the Department of Defense that all rights granted by the easement were necessary for the operation of ABIA. By the time of trial, ABIA operations had consisted of almost 7000 uses of the runway by civilian commercial airliners and only a few dozen transient military flights. The City has never even tried to explain why it needed an avigation easement for a handful of military overflights but did not require one for the thousands of commercial "for profit" overflights which occurred simultaneously. Neither has the City tried to explain why the military overflight rights had not expired when the Air Force Base was closed.

## REASONS FOR GRANTING THE PETITION

The Court has not written an overflight case since its 1962 opinion in *Griggs*. That holding seemed to firmly establish the rule that the approach area to the landing strip is as much a part of the airport as the runway itself. It requires that the airport proprietor acquire overflight rights within the approach area, at least in those locations where airplanes routinely operate below the level of safe avigation (1000 feet in congested areas, 500 feet in uncongested). In the subsequent opinion of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court

reiterated a rule of strict liability for inverse condemnation cases involving physical takings. The Court specifically rejected any requirement of substantial interference or injury in holding that all physical takings cases require market value compensation, regardless of how slight the intrusion or how beneficial the public purpose involved. The Court specifically included both *Griggs* and *Causby* within the ambit of this rule. After *Griggs* and *Loretto*, the Petitioner has been unable to locate a single Federal overflight precedent involving the glide slope which does not acknowledge the necessity of an avigation easement under these circumstances.

In explaining its decision to reverse, the Texas Supreme Court does not address the "bridge/roadway" analogy of *Griggs* or the holding in *Loretto*. It purports to rely instead on language set out in *United States v. Causby*. The court acknowledges the unchallenged finding of almost $3,000,000 in market value damages. It concedes the unanimous testimony of the experts concerning the reduction in landfill capacity, increase in risk of operation, and additional operating costs associated with the overflights. The court holds that this undisputed proof of interference with the property was insufficient to establish the existence of taking. In announcing a standard inconsistent with the actual language of *Causby*, the Texas Supreme Court denies liability on facts which routinely establish a taking in Federal trial courts.

The Court should grant writ and reaffirm the bright line rule of liability established in *Griggs* and *Loretto* as well as the legal and evidentiary standards utilized in *Causby*. The Court should reverse this decision which deprives TCLC of due process and also invites instability

in an area of law long thought settled by the condemnation bench and bar.

## I. The Texas Supreme Court failed to afford proper deference to the holdings in *Griggs* and *Loretto*.

This Court last addressed taking by overflight in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). In its only mention of this holding, the Texas Supreme Court characterizes it as a mere restatement of the rule earlier set out in *United States v. Causby*, 328 U.S. 256 (1946). (App. 6). Careful reading of these cases and analysis of their history refutes this conclusion.

In *Causby*, the Court first recognized the cause of action for taking by overflight but declined to specifically define the dividing line between the landowner's protected property and the public domain. "The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are." *Causby*, at 267. The Court noted that the Civil Aeronautics Act's definition of navigable airspace did not include the approach/takeoff glide slope, ruled that flights below the level of safe avigation are not privileged, and found a taking on the facts before it.

Congress subsequently amended the C.A.A. to include within the definition of navigable airspace the areas necessary for takeoff and landing. Conflicting lines of authority quickly arose among the appellate courts. Some jurisdictions, including the Commonwealth of Pennsylvania, determined that the amendment to the Act effectively "nationalized" the approach/departure glide slope so that the cause of action for taking by overflight in the

approach area was no longer viable. *Griggs v. Allegheny County*, 401 Pa. 411, 168 A. 2d 123 (1961). Other jurisdictions, including the State of Washington, rejected this argument and continued to allow recovery, reasoning that no amendment to the statute could eliminate a claim arising under the Constitution. *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960). This Court granted writ in *Griggs* to resolve the issue.

The Court first rejected the idea that the amendment to the statute could eliminate the cause of action noting that literal application of the new definition would allow overflights so low as to destroy all economic value of the land without the payment of compensation, a clearly unconstitutional result. The Court also detailed some of the trial evidence to demonstrate the unique hardships placed upon a landowner unfortunate enough to find himself beneath the glide slope. *Griggs,* at 87. The Court then undertook to answer the question which it had left open in *Causby* and give some definition to the boundary between public airspace and private ownership.

The Court likened the airstrip to a public bridge and the approach area as the roadway leading up to it. The Court noted that the roadway section is as much a part of the facility as the bridge itself, and applied this analogy directly to the airstrip and glide slope.

> The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for the operation of a bridge, or as is the land for the operation of a dam. See *United States v. Virginia Electric Co.*, 365 U.S. 624, 630. As stated by the Supreme Court of Washington in *Ackerman v. Port of Seattle*, 55 Wash. 2d 401, 413, 348 P. 2d 664, 671 " . . . an

> adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed . . . ". Without the "approach areas," an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.
>
> *Griggs*, at 90.

After the decision in *Griggs*, the Court of Claims adopted a definition of "navigable airspace" which included only airspace above the safe level of avigation, effectively ignoring the 1958 amendment to the Act. *Aaron v. United States*, 311 F.2d 798, 801 (Ct. Cl. 1963); *Persyn v. United States*, 34 Fed. Cl. 187, 195 (1995). The definition and tests set out in these opinions have been consistently followed in every reported federal opinion. The Federal Aviation Administration has also adopted the rule in its advisory circular to local airport operators. Airport proprietors are told that avigation easements are "normally required" for the runway approach areas and they are warned that where overflights will occur, lesser rights, such as clearance easements, are insufficient to protect the airport operator from liability. *Federal Aviation Administration Advisory Circular* No. 150/5100-17 at p. 2-6.

In a subsequent opinion, this Court clarified the difference between physical and regulatory takings, and reaffirmed the rule of strict liability where government physically invades the landowner's property for public purposes. "We affirm the traditional rule that a permanent physical occupation of property is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). The Court specifically rejected the notion that the

size of the physical invasion or the benefit conferred upon the public by it was a relevant inquiry. *Loretto*, at 436, 437. It opted for the bright-line rule of strict liability because it supplied predictability and stability to the law by providing a readily ascertainable standard of proof. *Loretto*, at 437. In the discussion of the precedents supporting the opinion, the Court included both *Causby* and *Griggs* as examples of physical taking cases (*Loretto*, at 430, 431), apparently including approach zone overflights within the rule of strict liability.

The bright line rule of strict liability for the approach area is consistent with the most important principles of takings law. The evidence in this case established that pilots are generally strictly forbidden to operate aircraft below the safe level of avigation except when landing or taking off. Landowners within the final approach area thus suffer burden and injury which is virtually unique to them for the safety and benefit of all members of the traveling public. This Court has often noted that the purpose of the takings clause is to prevent one landowner from bearing burdens which, in fairness, should be shared by all. The Court has also held that the essence of real property ownership lies in the right to possess, use and dispose of it. Physical possession by a third party effectively destroys all of these benefits of ownership, including the vital right to exclude others, the very essence of real property ownership. *Loretto*, at 435, 436.

Unfortunately, the Texas Supreme Court did not address the "bridge/roadway" analogy of *Griggs* or the bright line rule of strict liability for physical takings set out in *Loretto*. The only part of this argument that the court even mentioned was a single sentence from the Petitioner's brief in which TCLC argued that its theory of

liability was not predicated on its inability to expand the landfill. (App. 11, footnote 2). Rather than address the physical taking/strict liability argument, the court seized upon this language to summarily dismiss further discussion of the unchallenged loss of 1.7 million cubic feet of landfill capacity and the market value damages resulting from it. In the Texas Supreme Court, TCLC actually made the same argument that it is making here. Where a physical taking is demonstrated, the landowner's right to compensation is established without reference to the extent of physical invasion involved. The extent of invasion becomes relevant in the determination of damages. "Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance." *Loretto*, at 437, 438.

The Texas Supreme Court did not address or even mention the condemnee's argument under *Griggs* and *Loretto*. In fact, the *Loretto* holding is not even mentioned in the holding below. Instead, the court looked to a flawed reading of *Causby* combined with general rules applied in regulatory taking cases and simply failed to address the physical invasion issue.

In refusing to apply *Griggs* and *Loretto*, the Texas Supreme Court has established a standard of liability which falls below that required by the Fifth Amendment. It has also invited an era of discord where the law has previously been stable. Since *Griggs* and *Loretto*, the Fifth Amendment has not changed and airplane overflights have certainly not become less frequent or less intrusive. The Court should grant the writ and reverse this holding,

reaffirming liability for unprivileged physical takings within the final approach area.

## II. The legal test for liability and standard of proof announced by the Texas Supreme Court are inconsistent with the holding in *Causby* and its progeny.

Ignoring this Court's latest writings in *Griggs* and *Loretto*, the Texas Supreme Court claims to derive its rule of liability from the holding in *Causby*. The Court's formulation of that rule requires that " . . . a landowner must show that the overflight effects impacted the land directly, immediately, and substantially so that the property was unusable for its intended purpose." *Causby*, 328 U.S. at 266. (App. p. 1). In the same paragraph, the Court concludes that even a showing of substantial decrease in the market value of the property is not sufficient, that some direct evidence of physical damage to the underlying land is required. Neither of these standards has any support in the *Causby* decision or any of the appellate precedents which have followed it.

The actual announcement of the rule of liability in *Causby* requires only that the landowner prove that overflights are a direct and immediate interference with the enjoyment and use of the land, not that they have terminated that use altogether. In addition, the *Causby* opinion recognizes that a measurable decrease in the market value of the property is, in and of itself, sufficient evidence of interference with enjoyment to establish a taking.

> Flights over private land are not a taking, unless they are so low and so frequent as to be a direct

> and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. The findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.
>
> *Causby,* at 266-267.

To the extent the inquiry remains relevant in approach zone cases after *Loretto,* the evidence in this case seems sufficient to establish a taking under the "substantial interference" prong of the *Causby* test. The jury's determination that the property was devalued by $2,950,000 has gone unchallenged throughout this appeal. The City's own evidence suggests a diminution in value of $2,300,000 or about one-fourth of the undisputed value of the whole. The engineering witnesses from both parties agreed that but for construction and operation of the airport, the Petitioner's landfill permit would be expanded by 1.7 million cubic yards. Every witness to testify on the subject agreed that landfill operations were made more expensive and riskier because of the overflights and that these changes damaged the land's market value. The evidence showed that until the City made its special petition to the Federal Aviation Administration in this case, landfill uses in the area occupied by the TCLC property were absolutely prohibited as unsafe.

Despite this substantial evidence of reduction in the landowner's ability to use and enjoy his property, the Supreme Court of Texas denied a recovery. The court noted that as of the date of trial, the property remained raw land

and had not been developed for its agreed highest and best use as a landfill. The court held that because the physical effects of the overflights did not impair the current use of the property as vacant and because they did not prohibit the future highest and best use of the property as a landfill altogether, that the "substantial interference" test of *Causby* had not been met. This conclusion is not supported by the few federal precedents which have been required to apply the general rule of *Causby* after the specific rule of liability relating to the approach area was settled in *Griggs* and *Loretto*.

In a rare overflight case which did not involve the approach area to a public airport, the Federal Circuit Court of Appeals recently wrote a well-reasoned analysis of the "substantial interference" test. In *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1966), the Court was faced with numerous recurring overflights below the level of safe avigation by military jets practicing their bombing runs in a remote area of southwest Texas. The Court of Claims had found that the flights were frequent and recurring and took place below the 500 foot ceiling but nonetheless failed to find liability. The trial court reasoned that because there was no immediate and substantial interference with the **current** uses of the property for livestock grazing and recreational hunting the "interference" prong of the *Causby* test had not been met.

The Circuit Court first observed that approach area overflight cases fall under the category of physical takings. *Brown*, at 1101, 1102. It then noted that the opinion in *Causby* requires only proof of direct and immediate interference with the landowner's use and enjoyment of the land and that the requirement of substantiality is a "gloss" on the test added by subsequent case law. *Brown*, at p.

1102. The Circuit Court rejected the standard of liability imposed by the Court of Claims and held that a reduction in current market value brought about by injury to potential future uses of the property was sufficient to meet this part of the test.

> Under the government's view, the government would be able to make uncompensated use of private property if that use did not immediately interfere with the landowner's current use. Thus, overflights could not give rise to compensable taking on land held for investment purposes or for future development. The government effectively could preclude future common lawful uses of the property – uses which have been recognized and valued by the market before the overflights – without compensation to the owner, simply by making such uses undesirable or unprofitable. The Fifth Amendment does not permit the government to destroy individual rights in that manner.
>
> *Brown*, at 1105.

The undisputed trial evidence established that the City would not have been eligible to acquire the remaining benefits of the 1982 easement but for its decision to locate the new municipal airport at the site of the former Bergstrom Air Force Base. Absent that relocation, the undisputed evidence proved the easement would have been conveyed to the owner of the fee, TCLC, for a fraction of the original purchase price under regulations promulgated under the Defense Base Closure Act. Every witness who testified on the subject, including three directly associated with the City, agreed that the rule of project influence prohibited consideration of the 1982 easement in assessing the property before the taking. The project

influence rule requires that the before-taking value of the whole property be established without reference to the pending taking or the project which brought it about. It has been traditionally applied by this Court and virtually every other common law jurisdiction. The City's director of right-of-way acquisition admitted that Federal statute requires application of the rule in acquisitions for ABIA and freely admitted (as did the City's appraiser) that it would be inappropriate to include consideration of the 1982 easement in the before-taking inquiry.

The Texas Supreme Court has previously embraced the project influence rule in the context of municipal airport relocation. *City of Fort Worth v. Corbin*, 504 S.W. 2d 828, 831 (Tex. 1974). In that case, the court applied the rule to reverse a judgment in favor of the landowner who was deemed to have used airport-related comparable sales to unfairly inflate his recovery. In the case at bar, the Texas Supreme Court does not address or even mention the rule which was observed by both sides, without objection, in the lower court. Instead, the Texas Supreme Court dismisses the landowner's claim for damages arising from increased risk and operating cost because of the alleged pre-existing burden imposed by the 1982 easement. The court relies heavily on the handful of continuing military overflights which were conducted after ABIA opened without even addressing the fact that these overflights were apparently not privileged by the easement after Bergstrom Air Force Base was permanently closed in 1993.

The rule announced by the Texas Supreme Court requires even more than "substantial" interference with future use and enjoyment of the underlying property. It requires that the proposed use be prohibited altogether. In

holding that an undisputed finding of a substantial decrease in utility and market value is insufficient to establish liability, the Texas Supreme Court further departs from the actual *Causby* holding. The Court should grant this writ and reaffirm the standards which are set out in *Causby* and its progeny.

## CONCLUSION

The Texas Supreme Court has announced a rule of liability which is far less protective of the landowner's right to compensation than the standard established by this Court under the Fifth Amendment. The Texas court rejected the very evidence specifically held sufficient in *Causby* and ignored the physical taking aspect of this case as discussed in *Griggs* and *Loretto*. The Texas Supreme Court denied this landowner minimum substantive due process of law. The opinion also brings discord to an area of the law which, for 40 years, had been comfortably settled under *Griggs* and confirmed by 20 years of practice under *Loretto*. The Court should grant the writ and reverse the judgment of the lower court thereby providing this landowner with just compensation and returning precedential stability to this area of the law.

Respectfully submitted,

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# IN THE SUPREME COURT OF TEXAS

No. 00-0944

CITY OF AUSTIN, PETITIONER

v.

TRAVIS COUNTY LANDFILL COMPANY, L.L.C., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

**Argued on October 17, 2001**

JUSTICE O'NEILL delivered the opinion of the Court.

In this case we consider the constitutional standard necessary to establish a "taking" of private property by aircraft overflights under the Texas Constitution. *See* TEX. CONST. art. I, § 17. Purporting to follow *United States v. Causby,* 328 U.S. 256 (1946), the court of appeals affirmed the trial court's compensation award to the property owner. 25 S.W.3d 191, 204. It held that a decrease in the land's fair market value caused by airport operations resulted in a taking even though the landowner did not show that overflight effects had directly harmed the underlying property. *Id.* at 201. While we agree that *Causby* defines the constitutional standard necessary to prove a taking in this case, we conclude that the court of appeals misapplied that standard. To establish a taking by aircraft overflights, a landowner must show that the overflight effects impacted the land directly, immediately, and substantially so that the property was unusable for its

intended purpose. *See Causby,* 328 U.S. at 266. Because here the landowner's evidence did not meet this standard, the landowner did not establish a taking. Accordingly, we reverse the court of appeals' judgment and render judgment that the property owner take nothing.

## I Background

Bergstrom Air Force Base, located in southeast Travis County, was closed in 1991 as a part of the federal government's military-base closure policy. Under a 1942 agreement between the federal government and the City of Austin, the Bergstrom property reverted to the City. The City decided to develop a new municipal airport at the Bergstrom location, and the City's voters approved Austin-Bergstrom International Airport's (ABIA's) construction in a May 1993 referendum. The airport began civilian operations in June 1997, and some military flights still operate from the airport. This case involves the municipal airport's impact on Travis County Landfill Company's (TCLC's) nearby property.

TCLC owns a 133-acre tract of land located about one-half mile south of the airport's main runway. TCLC's predecessor in interest, 244 Joint Venture, obtained a Type IV landfill permit for this tract that would allow it to receive non-putrescible dry waste, such as construction rubble, tree clippings, and tires. Although the permit was obtained in 1988, an ensuing lull in building projects resulted in an insufficient stream of construction waste, causing the company to postpone opening the landfill. By the time of trial, landfill operations had still not commenced and the property remained undeveloped raw land.

Significant legal restrictions pre-existing the airport's municipal use limit TCLC's use of the airspace immediately above its land. The property is burdened by a Deed of Easement that TCLC's predecessor in interest granted to the United States and which the City now owns. That deed conveys what is called an avigation easement, which allows 60,900 military aircraft unobstructed passage over TCLC's property each year. The deed also describes certain airspace above the property as approach-departure and transition zones, and conveys a "clearance" or "obstruction" easement that allows the City to prohibit or remove vegetation, buildings, and other structures that extend into those zones.

When civilian flights began operating from Bergstrom in 1997, TCLC sued the City alleging that the flights over its property constituted an unconstitutional taking of its property. *See* TEX. CONST. art. I, § 17. TCLC sought a judgment declaring that the avigation easement does not grant the City civilian overflight rights. It also requested a temporary injunction preventing the City from directing civilian flights over its property until the City obtained overflight rights through condemnation proceedings or the purchase of an easement.[1] TCLC further sought actual and exemplary damages for trespass and inverse condemnation, together with attorneys' fees, interest, and costs.

[1] The trial court issued a temporary injunction, which the City appealed. Ultimately, the court of appeals dissolved the injunction. *City of Austin v. Travis County Landfill Co.*, No. 03-97-00515-CV, 1998 WL 78641 (Tex. App. – Austin February 26, 1998, no pet.) (not designated for publication).

At trial, TCLC's experts testified that, excluding the airport's existence, the highest and best use of TCLC's property is a Type IV landfill vertically expanded beyond its existing permit. The evidence indicates that, absent the airport, TCLC could have obtained a vertical expansion from the Texas Natural Resource Conservation Commission. But, apparently, in reaching this conclusion, the experts did not consider the pre-existing military-avigation easement, ongoing military flights from the municipal airport, or the City's clearance easement. According to TCLC's experts, the airport's operations substantially reduced the property's fair market value because (1) TCLC was unable to vertically expand its landfill beyond the existing permit, and (2) there are increased risks associated with operating a landfill in close proximity to a municipal airport. 25 S.W.3d at 201. Both parties' experts agreed that the property's fair market value, excluding the airport from consideration, was $9,800,000. But they disagreed about the property's value after taking the airport's operation into account.

The trial court submitted both liability and damage issues to a jury. The jury found that the City took the airspace over TCLC's property by overflights associated with the airport's operation. It also determined that the fair market value of TCLC's property after the taking was $6,850,000. The City moved for judgment notwithstanding the verdict, claiming that there was no evidence that the overflights interfered with TCLC's use and enjoyment of the property. The trial court denied the City's motion and rendered judgment in TCLC's favor for $2,950,000, the difference in the property's value before and after the taking. The trial court also entered findings of facts and conclusions of law in support of the judgment, concluding

that the City took TCLC's property by overflights without adequate compensation. But it refused TCLC's request for attorneys' fees and injunctive relief. Both the City and TCLC appealed.

The court of appeals, with one justice dissenting, affirmed the trial court's judgment and compensation award. 25 S.W.3d at 204. Only the City petitioned this Court to review the court of appeals' judgment. We granted the City's petition to decide whether TCLC established that the civilian overflights, above and beyond the military overflights, constituted a taking under the Texas Constitution.

## II The Constitutional Standard

Article I, section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person. . . . " TEX. CONST., art. I, § 17. The federal takings clause is substantially similar. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation"). This similarity has led us, in other contexts, to rely on the United States Supreme Court's interpretation of the federal takings clause in construing our takings provision. *See, e.g., City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. The Town of Sunnyvale,* 964 S.W.2d 922, 933 (Tex. 1996) (citing *Causby* for the proposition that determining whether a taking occurred is a question of law).

We have never decided when aircraft overflights constitute a taking of property under our constitution, though our courts of appeals, including the court of appeals in this case, have invoked the federal standard. *See* 25 S.W.3d at 198; *see also Wilkinson v. Dallas/Fort Worth Int'l Airport Bd.,* 54 S.W.3d 1, 16-17 (Tex. App. – Dallas 2001, pet. denied) (holding overflights must cause a direct, immediate, and substantial interference with the landowner's use and enjoyment); *City of Houston v. McFadden,* 420 S.W.2d 811, 814 (Tex. Civ. App. – Houston [14th Dist.] 1967, writ ref'd n.r.e) (recognizing a taking-by-overflight claim under the federal standard). Because both the City and TCLC argue that Texas takings jurisprudence tracks the federal taking-by-overflight standard, we assume, without deciding, that the federal and state constitutions provide the same protections from overflight effects. *See Mayhew,* 964 S.W.2d at 932 (applying the "more familiar" federal land-use standard to a taking claim because the claimant urged that Texas follows the federal jurisprudence). Thus, we consider TCLC's taking claim under the federal *Causby* standard.

*Causby* states that the "air is a public highway," and airspace above the land "is part of the public domain"; thus, the inconveniences that flights over private property cause "are normally not compensable under the Fifth Amendment." *Causby,* 328 U.S. at 261, 266. To constitute a taking, the flights over private land must be "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266. In *Causby,* the claimants operated a commercial chicken farm and lived on their property. *Id.* at 259. Military aircraft, including fighters, transports, and bombers, continuously overflew the land, creating "startling" noise that caused a

substantial number of the claimants' chickens to die and caused a drop in production from others. *Id.* Because of the overflights, the land could no longer be used as a commercial chicken farm. *Id.* The evidence also showed that loud noise and the planes' bright lights frequently deprived the claimants of sleep, and they became nervous and frightened. *Id.* The Court held that these facts established "a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266-67.

Similarly, in *Griggs v. Allegheny County,* civilian airplane overflights caused noise comparable to that of "a riveting machine or steam hammer" that made people in the house unable to converse or sleep. 369 U.S. 84, 87 (1962). The overflights caused vibrations that separated plaster from the walls and ceilings, and the residents became nervous and distraught. *Id.* Residential use became impossible, and the claimants were forced to move out of their home. *Id.* Applying *Causby,* the Supreme Court held that the overflights had so interfered with the claimants' use and enjoyment of their property that a taking occurred. *Id.* at 87-88.

In *McFadden,* the Fourteenth Court of Appeals followed *Griggs* and recognized a takings claim when the evidence showed that aircraft overflights caused blinding glare, intense noise that made communication impossible, jet sprays, and vibrations that broke windows and cracked walls. 420 S.W.2d at 814. Other jurisdictions have also held that overflight-related effects that impact the property's surface, such as noise, vibrations, and fumes, constitute a taking by overflight. *See Melillo v. City of New Haven,* 732 A.2d 140, 141 (Conn. 1999) (observing that the trial court's finding that noise and turbulence interfered with enjoyment of the property was enough to establish a

taking under *Causby* and therefore under the Connecticut Constitution, but concluding that the plaintiffs were not entitled to compensation because they failed to show economic harm); *Johnson v. City of Greeneville,* 435 S.W.2d 476, 478-80 (Tenn. 1968) (concluding that allegations that noise and vibrations from airplane overflights caused physical distress and fear and interfered with the property's use stated a takings claim under the Tennessee Constitution); *State v. City of Columbus,* 209 N.E.2d 405, 408-09 (Ohio 1965) (holding that there was a taking under the Ohio Constitution when the evidence demonstrated that overflights caused disruption of sleep and physical damage to walls and personal property); *Martin v. Port of Seattle,* 391 P.2d 540, 540-42 (Wash. 1964) (stating that noise from airplanes' takeoff and landing can establish a taking under the Washington Constitution); *Johnson v. Airport Auth. of Omaha,* 115 N.W.2d 426, 434-35 (Neb. 1962) (affirming trial court's judgment in the property owner's favor in a condemnation case under the Nebraska and federal Constitutions when the evidence showed that intense vibrations interfered with the property's use and enjoyment and caused fear); *Smart v. City of Los Angeles,* 112 Cal. App. 3d 232, 238 (Cal. Ct. App. 1980) (stating that a taking claim did not accrue for limitations purposes when there was no "alter[ation] or damage [to] the physical characteristics of the land or interference with its use"); *Hillsborough County Aviation Auth. v. Benitez,* 200 So.2d 194, 196, 199 (Fla. Dist. Ct. App. 1967) (holding that, under the Florida Constitution, a taking by overflight occurred because conversations were impossible, television reception was disturbed, sleep was interrupted, fuel residue was deposited on property, and vibrations affected the residential structure).

Thus, the federal standard and the standard that various state courts have recognized requires that, to rise to the level of a constitutional taking, the overflight-related effects must directly, immediately, and substantially impact the property's surface so that it is no longer usable for its intended purpose. *See Causby,* 328 U.S. at 262 (highlighting examples of taking by overflights, including a factory relegated to grazing land and an orchard reduced to a vegetable patch); *Griggs,* 369 U.S. at 89 (overflights rendered residential living impossible); *see also Cheyenne Airport Bd. v. Rogers,* 707 P.2d 717, 724 (Wyo. 1985) (noting that federal and state courts have consistently held that a taking-by-overflights claim does not exist unless the overflights create a nuisance such as surface impacts).

Under *Causby, Griggs,* and their progeny, to establish a taking by aircraft overflights, a landowner must show that the flights directly, immediately, and substantially interfere with the land's use and enjoyment. To meet this standard, the landowner must show that the overflight effects directly and immediately impact the land so that the property is no longer usable for its intended purpose. It is against this constitutional standard that we review the evidence that TCLC presented here.

## III Standard of Review

In this case, the trial court submitted the taking question to the jury, instructing them that a taking by overflight occurs if "the flights result in a substantial interference with the owner's ability to use and enjoy his property *or* if the overflights result in a substantial decrease in the market value of the property." (Emphasis

added). The dissenting justice in the court of appeals concluded that this instruction, which allowed the jury to find a taking on the alternative basis that the overflights caused a decrease in the property's market value, was an incorrect statement of the law that probably caused the rendition of an improper judgment. 25 S.W.3d at 211 (PATTERSON, J., dissenting). We agree that the trial court incorrectly stated the law by equating a fair-market-value decline with a taking without considering the overflights' immediate and direct effects on the land's surface. *See Causby,* 328 U.S. at 265. However, determining whether a taking has occurred is a question of law for the court. *General Servs. Comm'n v. Little-Tex Insulation Co.,* 39 S.W.3d 591, 598 (Tex. 2001) (relying on *Mayhew,* 964 S.W.2d at 936). Consequently, the jury's conclusion that the overflights resulted in a taking of TCLC's property is immaterial. *See Spencer v. Eagle Star Ins. Co. of Am.,* 876 S.W.2d 154, 157 (Tex. 1994).

The trial court made findings of fact and conclusions of law to support its final judgment, and found that "[f]lights through TCLC's airspace from ABIA result in a substantial interference with TCLC's ability to use and enjoy its property *and* result in a substantial decrease in the market value of the property." (Emphasis added). Although, as we have said, a decrease in market value alone will not support the conclusion that a taking has occurred, the trial court also found that the overflights substantially interfered with TCLC's use and enjoyment of its property. While we depend on the fact-finder "to resolve disputed facts regarding the extent of governmental intrusion," the ultimate issue of whether the facts constitute a taking is a question of law. *Mayhew,* 964 S.W.2d at 933. Accordingly, in this case, we decide whether the

evidence established that civilian overflights, above and beyond the military overflights and their accompanying pre-existing burden on the property, rise to the level of a constitutional taking.

## IV The Evidence

The evidence that TCLC relies upon to support its taking claim falls into four general categories: (1) invasion of TCLC's airspace by civilian overflights; (2) a decrease in the fair market value of TCLC's property; (3) increased risks and operating costs associated with operating a landfill in close proximity to the airport; and (4) increased risk of liability due to bird air-strike hazards.[2] But none of these factors are immediate, direct, and substantial overflight effects that rendered TCLC's property unusable for its intended purpose.

### A. Invasion of TCLC's Airspace

TCLC argues that its taking claim is based on "the right to exclude overflights by civilian cargo and passenger jetliners." TCLC argues that, "[a]lthough the right to exclude military avigation had been sold, the right to demand additional compensation should Bergstrom become a civilian airport remained a portion of the bundle

[2] TCLC also claimed that there was substantial interference with its use and enjoyment of the property because the airport overflights prevented it from vertically expanding its landfill. But TCLC disclaims that argument here, stating in its brief that "TCLC's liability case is not predicated upon the loss of its ability to expand the landfill." Consequently, we do not consider the effect of TCLC's inability to expand the landfill in evaluating its taking claim.

of rights" retained by TCLC. Thus, it claims, evidence of civilian overflights alone is enough to show that an unconstitutional taking of property occurred. We disagree.

A landowner has no right to exclude overflights above its property, because airspace is part of the public domain. *Causby,* 328 U.S. at 266. Rather, a property owner is entitled to compensation if its property is taken by overflights that immediately and directly interfere with the property's use and enjoyment. *Id.* This inquiry requires a more extensive factual showing than the mere existence of overflights. As one federal court has noted, "an invasion of airspace above surface land does not *per se* constitute a taking." *Brown v. United States,* 73 F.3d 1100, 1104 (Fed. Cir. 1996); *see also Ronald C. Bodine v. U.S.,* 210 Ct. Cl. 687, 688 (Ct. Cl. 1976) ("[T]here are no cases concerning the wrongful use of airspace only."). That civilian aircraft overflew TCLC's property, without more, does not establish that an unconstitutional taking occurred.

### B. Decline in Fair Market Value

Although the Texas Constitution forbids the taking of private property without adequate compensation, it does not "require compensation for every decrease in market value attributed to a governmental activity." *Felts v. Harris County,* 915 S.W.2d 482, 484 (Tex. 1996); *see also Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 131 (1978) (holding that diminution in fair market value, alone, does not establish a taking). We are aware of no court that has held that a decline in land's fair market value, by itself, establishes that a taking by aircraft overflights has occurred. Some courts have considered fair-market-value decline as a factor in determining whether

the government has interfered with the property's use and enjoyment. *See, e.g., Brown,* 73 F.3d at 1105 (holding that a significant and immediate decline in market price that is directly attributable to overflights strongly suggests such interference); *Branning v. United States,* 654 F.2d 88, 102 (Ct. Cl. 1981) (concluding that noise created by overflights "'practical[ly] destr[oyed]'" the property and decreased its market value, which resulted in a taking (quoting *Aaron v. United States,* 311 F.2d 798, 801 (Ct. Cl. 1963))); *Long v. City of Charlotte,* 293 S.E.2d 101, 110 (N.C. 1982) (stating that no taking occurs unless the overflights amount to a "'material interference with the use and enjoyment of property such that there is substantial diminution in fair market value'" (quoting *Cochran v. City of Charlotte,* 281 S.E.2d 179, 186 (N.C. Ct. App. 1981))); *Thornburg v. Port of Portland,* 415 P.2d 750, 751-52 (Ore. 1966) (measuring substantial interference by the property's fair-market-value decline). But the market-decline factor has been carefully limited to situations in which the decline was "directly attributable to overflights" and their direct effects on the property's surface. *Brown,* 73 F.3d at 1104-05; *see also Persyn v. United States,* 34 Fed. Cl. 187, 207 (Fed. Cl. 1995) (observing that a significant decrease in the property's market value "'as a direct result of the overflights'" is a prerequisite for recovery (quoting *Boardman v. United States,* 376 F.2d 895, 899 (Ct. Cl. 1967))); *Branning,* 654 F.2d at 102 (holding that noise associated with military overflights destroyed the value of property for residential use); *Hoyle v. City of Charlotte,* 172 S.E.2d 1, 23-24 (N.C. 1970) (relying on the physical effects of overflights, including noise, to conclude that overflights have affected the property's market value).

In this case, on the other hand, the record does not show that overflight-related effects directly impacted the property's surface and caused the property's value to decline. TCLC does not even allege that overflight effects, such as noise, fumes, or fuel sprays impacted the use and enjoyment of its property as a landfill. Nor did TCLC's appraisal expert consider the civilian overflights' effects on the property's use and enjoyment in calculating the property's fair market value after the alleged taking. Because TCLC failed to show that civilian overflight effects caused or contributed to the land's market-value decline, that decline, alone, does not establish a constitutional taking.

### C. Increased Risks and Landfill-Operation Costs

TCLC argues that the civilian overflights and general airport operations exposed it to increased risks and costs associated with operating the landfill, and that this is sufficient to establish interference with TCLC's use and enjoyment of the property. But to establish a taking claim, TCLC must show that the civilian overflights, separate and apart from the burdens already imposed on its property by ongoing military flights and the accompanying military-avigation easement, substantially increased risks and costs that interfered with the property's use as a landfill. TCLC relies on two federal cases – *Avery v. United States,* 330 F.2d 640 (Ct. Cl. 1964) and *Davis v. United States,* 295 F.2d 931 (Ct. Cl. 1961) – that hold that a subsequent taking occurred because additional military overflights, above and beyond those covered by a pre-existing easement, began. But both cases are distinguishable. In *Davis,* the court held that the property owner established a subsequent taking because the introduction of new, dramatically noisier military aircraft rendered the

residence "uninhabitable" and property improvements "substantially worthless." *Davis,* 295 F.2d at 932-33. Likewise, in *Avery,* the court relied on the addition of "larger, heavier, noisier" military aircraft that affected the property's use and enjoyment to conclude that a subsequent taking occurred. *Avery,* 330 F.2d at 642.

Here, however, TCLC presented no evidence that the addition of civilian overflights caused overflight effects that interfered with the use of TCLC's property as a landfill. Although TCLC's appraisal expert did testify that there are risks associated with the landfill's close proximity to Bergstrom and that "the flights are low and frequent and that adds . . . potential hazards to the property," this conclusory opinion is contrary to the expert's concession that he did not consider the effects of actual flights over the property. Moreover, the testimony fails to connect the alleged risks with overflight effects and does not establish that those risks interfered with the property's use as a landfill. TCLC's only argument is that the additional civilian overflights exceeded the scope of the pre-existing military-avigation easement. But this is not enough to establish that overflights, above and beyond the property's pre-existing burdens, substantially interfered with the property's use and enjoyment as a landfill.

TCLC also failed to quantify these risks and hazards or specifically describe how they interfered with TCLC's use and enjoyment of the property. Such nonspecific allegations are not enough to establish a taking, because a property owner must demonstrate that the interference with the property's use and enjoyment is "substantial." *See Brown,* 73 F.3d at 1102. Although TCLC explains that operating restrictions require it to prevent smoke, dust, and birds from interfering with overflights, and that these

restrictions impinge on TCLC's use and enjoyment of the property, the evidence did not demonstrate that civilian overflights would actually cause TCLC to incur additional costs or that those additional costs would be substantial. The only evidence of increased costs TCLC presented related to bird-dispersal programs, but these requirements were a condition for TCLC's landfill permit before the civilian overflights began. Thus, any expenses TCLC incurred were not attributable to civilian overflights, but to pre-existing burdens imposed on its property by ongoing military overflights and the accompanying military-avigation easement. We conclude that TCLC failed to present any evidence that civilian overflights increased the risks and costs of operating the landfill, or that these risks and costs substantially interfered with TCLC's use and enjoyment of the property.

### D. Bird-Strike Liability

Finally, TCLC argues that civilian overflights from Bergstrom expose it to increased potential liability from bird strikes. There is no evidence, and TCLC does not even allege, that the bird-dispersal program already in place as a condition of TCLC's permit would, because of civilian overflights over and above the burdens imposed on its property by ongoing military overflights and the accompanying military-avigation easement, fail to properly protect its airspace from birds. Consequently, there is no support for TCLC's argument that it would face increased liability from bird strikes. Thus, the judgment has no evidentiary support on this basis.

In sum, TCLC's taking claim focuses on nonspecific economic injuries and airspace invasion due to general

airport operations. TCLC failed to allege, much less prove, that overflight-related effects from civilian overflights above and beyond the ongoing military overflights and the accompanying military-avigation easement directly, immediately, and substantially interfered with its use and enjoyment of the property. And because before and after the alleged taking TCLC was authorized to operate a Type IV landfill – the property's intended use – there is no evidence that the overflights rendered the property unusable for its intended purpose.

## V Conclusion

To establish a taking of personal property by aircraft overflights in this case the landowner had to show that the overflight effects directly, immediately, and substantially impacted the land so that the property was unusable for its intended purpose. TCLC presented no such evidence. Because the evidence does not establish a taking, the court of appeals erred in awarding compensation to TCLC. Accordingly, we reverse the court of appeals' judgment and render judgment that TCLC take nothing.

Harriet O'Neill
Justice

OPINION DELIVERED: March 28, 2002.

**IN THE SUPREME COURT OF TEXAS**

No. 00-0944

CITY OF AUSTIN, PETITIONER

v.

TRAVIS COUNTY LANDFILL COMPANY, L.L.C., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

## JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Third District, and having considered the appellate record, briefs, and argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) Judgment is rendered that Travis County Landfill Company, L.L.C. take nothing; and

3) The City of Austin shall recover, and Travis County Landfill Company, L.L.C. shall pay, the costs incurred in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Third District and

to the District Court of Travis County, Texas, for observance.

Opinion of the Court delivered by Justice O'Neill

March 28, 2002

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**TEXAS COURT OF APPEALS,**
**THIRD DISTRICT, AT AUSTIN**

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No.03-98-00455-CV

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City of Austin/Travis County Landfill Company, L.L.C., Appellants

v.

Travis County Landfill Company, L.L.C./ City of Austin, Appellees

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FROM THE DISTRICT COURT OF
TRAVIS COUNTY, 126TH JUDICIAL DISTRICT
NO. 97-07362, HONORABLE SUZANNE COVINGTON,
JUDGE PRESIDING

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This case involves the City of Austin's operation of the Austin-Bergstrom International Airport ("the airport"). A jury found the City of Austin ("City") liable to the Travis County Landfill Company, L.L.C. ("TCLC") for taking, by overflights, the airspace over TCLC's property, which is located approximately one-half mile south of one of the airport's two runways. The jury also found that, as a result, TCLC suffered $2,950,000 in damages. The City appeals the trial court judgment rendered in favor of TCLC; TCLC appeals the trial court's denial of its request for a permanent injunction and attorney's fees. We will affirm the trial court's judgment.

## BACKGROUND

The City owns and operates the airport, which is located in southeast Travis County on a site formerly occupied by Bergstrom Air Force Base ("Bergstrom").[1] The airport came to be located on this site after the City's voters approved a May 1993 referendum to build a new municipal airport there. The City officially took ownership of the Bergstrom property during a September 1993 ceremony.

TCLC owns a 135-acre tract of land located approximately one-half mile south of airport runway 35L. This land is burdened by a "Perpetual Overflight Easement for Military Aircraft" (the "Easement") granted by TCLC's predecessors in title to the United States and its assigns. The Easement gives the grantee the right to prohibit or remove any obstacles from intruding into a certain amount of airspace above the subject property. The Easement also conveys "the right of unobstructed passage of all *military aircraft* and *aircraft operated under military control* . . . in all air space above the surface of the Grantors' property . . . ."[2] (Emphasis added.) The City informed the federal

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[1] The federal government decided to close Bergstrom in the early 1990s. Pursuant to a 1942 agreement between the City and the federal government, the Bergstrom property reverted to City ownership.

[2] The right to fly over the subject property is known as an "avigation" easement. The term "avigation" "applies to the navigation of airspace." 2A CJS *Aeronautics & Aerospace* § 2 (1972). "Thus, an avigation easement generally is an easement of right to the navigation of airspace over designated land and to the use of land as an incident to air avigation. . . . It provides not just for flights in the air as a public highway, but for flights that may be so low and so frequent as to amount to a taking of the property." *Id.*

government that it planned to operate the Bergstrom property as a municipal airport subject to federal regulation, and thus needed a number of easements acquired by the Air Force during its operation of Bergstrom. The federal government therefore assigned the Easement burdening TCLC's land to the City. According to Mike Mays, TCLC's manager,[3] the City asked TCLC to expand the Easement to permit overflights for all aircraft, rather than just military aircraft. Mays testified that TCLC refused the request because overflight rights are "a valuable asset" and TCLC did not feel that it "should have to donate [the rights] to the City." The City did not obtain or purchase an easement for civilian flights over TCLC's land.

The airport began commercial air cargo operations around June 30, 1997. TCLC sued the City, alleging that the City's operating and flying civilian operations through airspace over TCLC's land without permission constituted a taking of its property. *See* Tex. Const. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for . . . public use without adequate compensation being made."). TCLC requested the court to declare that the scope of the Easement did not include avigation rights for municipal airport purposes, and sought an injunction prohibiting the City from authorizing or directing overflights of the subject property until the City obtained legal overflight rights through condemnation proceedings or

[3] Mays compared his position to "a corporate officer, if [TCLC] were a corporation."

through purchase of an easement.[4] TCLC also sought actual and exemplary damages for trespass and inverse condemnation, as well as attorney's fees.

By the time the parties presented their case to the jury, the airport had flown over six thousand non-military flights through the airspace above TCLC's property. The City's position throughout trial was that TCLC had no right to the airspace above its land; therefore, civilian overflights did not take or cause any harm to TCLC's property. The City argued below and argues now on appeal that TCLC's property instead was harmed by height restrictions already imposed on the property by federal aviation law, the Easement, and the City's Hazard Zoning Ordinance. The City reasons that because these height restrictions burdened TCLC's land before the airport began flying air cargo operations over the land, the City took nothing from TCLC when civilian operations commenced.

The City's theory that TCLC's property is limited by height restrictions, rather than overflights, is based on the use to which TCLC intends to put the subject property. The trial evidence established that TCLC owns a permit to operate a Type IV landfill on its property. This permit allows dry waste to be deposited in the landfill, such as construction and remodeling rubble, tree clippings, and tires.

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[4] The trial court granted TCLC's request for a temporary injunction. The City appealed, and this Court dissolved the temporary injunction in an unpublished opinion. *See City of Austin v. Travis County Landfill Co.*, No. 03-97-00515-CV (Tex.App. – Austin February 26, 1998, no pet.) (not designated for publication).

We begin with a short history of the development of the landfill project. An enterprise named 244 Joint Venture purchased the subject property in 1983. Because the subject property is adjacent to the City's Type I landfill,[5] the members of 244 Joint Venture believed it could also be developed as a landfill. Therefore, they formed a partnership called the Travis County Landfill Company (the "Company") to obtain a permit to operate a Type IV landfill[6] on the property. The Company obtained the permit in 1988. Because of a lull in building projects in the late 1980s, the Company determined that there was an insufficient stream of construction waste to justify the expense of opening a Type IV landfill at that time.

In 1992, the Company changed its business structure to become TCLC, the limited liability company that is a party to this case. The Federal Deposit Insurance Corporation closed the bank holding 244 Joint Venture's note and requested full payment of the note. TCLC paid the outstanding amount of the bank loan in December 1993, thus bringing under its ownership both an interest in the subject property and the landfill permit.

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[5] A Type I landfill permits "putrescible" waste, such as household garbage. These types of landfills attract rodents and birds. Because it was not in the direct flight path of the two airport runways, the City was able to operate its landfill as a Type I landfill when the military operated the airport. When Bergstrom became a municipal airport, the FAA required the City's landfill to operate as a Type IV landfill.

[6] Bergstrom objected to the Company's original intent to operate a Type I landfill because a Type I landfill, located directly under the flight path of one of Bergstrom's runways, created the risk of birds interfering with takeoffs and landings.

The appraisal experts for the City and TCLC both testified that, excluding the existence of the airport, the highest and best use of TCLC's land was a Type IV landfill vertically expanded beyond the existing permit. TCLC also presented the testimony of a professional engineer who stated that but for the airport it was "extremely likely" that the Texas Natural Resource Conservation Commission ("TNRCC") would grant a vertical expansion of the existing permit.

Both parties' appraisal experts explained that valuing the subject property as if the airport did not exist is the first step in determining the damages resulting from an alleged taking by a federally funded project, such as the airport. After determining the fair market value of the whole property, excluding from consideration the construction and operations of the airport, the appraisers determined the fair market value of the property immediately after the taking, considering the uses to which the remainder will be subjected. Both parties' appraisal experts agreed that, excluding the existence of the airport, the highest and best use of TCLC's land was a vertically expanded Type IV landfill. Furthermore, both parties' experts testified that, excluding from consideration the construction and operations of the airport, the fair market value of TCLC's property was $9,800,000. Both experts also expressed the opinion that the fair market value of the property decreased with the airport in operation. Two reasons identified by the experts for the decrease in value were: (1) TCLC's inability to vertically expand its landfill beyond the existing permit; and (2) the increased risk associated with operating a landfill adjacent to a municipal airport. The experts differed as to the effect of the increased risk. The City's expert testified that the remainder of

TCLC's land, considering the airport operations, was worth $7,500,000, while TCLC's expert determined the remainder to be worth $6,200,000.

The trial court submitted both a liability and a damage question to the jury. The jury determined that the City took TCLC's airspace rights by overflights associated with the operation of the airport and determined the fair market value of the land after the taking to be $6,850,000, a sum between the two valuations presented by the experts.

The City moved for judgment notwithstanding the verdict, but the trial court denied the motion.[7] The trial court rendered judgment for TCLC and awarded it $2,950,000 in damages, the difference found by the jury in the property's value before and after the taking. The court denied TCLC's request for injunctive relief and attorney's fees. TCLC asked the court to make findings of fact and conclusions of law in support of the final judgment. The trial court concluded as a matter of law that, "[b]eginning on or about June 30, 1997, TCLC's superadjacent [sic] airspace rights were taken by regular and frequent overflights conducted in connection with the operation of [the airport]." The City appeals the trial court judgment in six issues, arguing in the first five issues that the trial court erred by denying the grounds stated in its motion for judgment notwithstanding the verdict, and arguing in its

[7] The trial court had also submitted to the jury a question regarding attorney's fees for TCLC. In its motion for judgment notwithstanding the verdict, the City argued that no statutory authority exists for the award of attorney's fees to TCLC. The trial court granted this part of the motion, which we will discuss when we review TCLC's appeal.

sixth issue that the trial court erred in its charge to the jury. TCLC also appeals the trial court judgment. In two issues, TCLC contends that the trial court abused its discretion by failing to enjoin overflights by the airport pending the City's payment of compensation and by failing to award TCLC attorney's fees.

## DISCUSSION

The City has consistently characterized TCLC's claim as a complaint that the height restrictions burdening its property prohibit it from expanding a landfill as high as it wishes. TCLC, on the other hand, alleged and proved to the jury's satisfaction that the City took its property by overflights; in other words, TCLC's complaint is based on the physical intrusion of aircraft into the airspace over its land. The City's desire to focus on the height restrictions burdening TCLC's property does not change the nature of the case pleaded and proved by TCLC. Therefore, we must determine whether the City's issues prove reversible error in the takings case presented to the jury.

### I. City's Appeal

*Height Restrictions on TCLC's Land*

At common law, "ownership of the land extended to the periphery of the universe." *United States v. Causby*, 328 U.S. 256, 260 (1945). Modern law, however, gives "exclusive sovereignty of airspace of the United States" to the federal government, and gives United States citizens "a public right of transit through navigable airspace." 49 U.S.C.A. § 40103(a)(1), (2) (West 1997). "Navigable airspace" means "airspace above the minimum altitudes of flight" prescribed by federal regulations, "including airspace

needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(30); *see also* 14 C.F.R. § 1.1 (1999). The Federal Aviation Administration ("FAA") has established the minimum altitude of flight as heights of 500 feet above ground level for uncongested areas and 1000 feet for congested areas. 14 C.F.R. § 91.119 (1999).

Much of the airspace over TCLC's land, including the airspace under 500 feet, is navigable airspace because it is needed to ensure safety in the takeoff and landing of aircraft utilizing the south end of airport runway 35L. Trial testimony established that pilots are required to follow a "glide slope" when they are landing aircrafts using their instruments, as opposed to their sight.[8] *See Persyn v. United States,* 34 Fed. Cl. 187, 198 (1995), *aff'd,* 106 F.3d 424 (Fed. Cir. 1996) (defining the term "glide slope"). The glide slope for runway 35L, established by the FAA, begins at 495 feet over the south end of TCLC's property and slopes down to 223 feet over the north end of the property, which is the area of the property closest to the runway. The FAA has also defined a number of "imaginary surfaces" for civil airports. *See* 14 C.F.R. § 77.25 (1999). One such surface is the "approach surface." *See id.* The approach surface for runway 35L begins at approximately 100 feet over the south end of TCLC's land and slopes down to approximately 35 feet above the north end of the land. The Easement, discussed above, permits the City to keep the approach surface over TCLC's land free of any obstacles. Thus, the imaginary surface acts as a ceiling

[8] A pilot landing under visual conditions may use his or her discretion in deciding whether to follow the glide slope, although the pilot has to fly "close" to it.

over the land, and the Easement prohibits obstructions from extending above that ceiling.

TCLC's land is thus burdened by federal regulations defining the land's superjacent airspace as navigable airspace. The City claims in its first issue that TCLC suffered no harm when the airport began operations in 1997 because federal law has restricted the airspace over the subject property since 1958, when Congress first defined "navigable airspace" to include airspace needed for safe takeoff and landing. The City makes similar claims in its third and fifth issues by arguing that a previous owner of the subject property was compensated for the height restrictions now burdening TCLC's land when the previous owner sold the Easement to the federal government in 1982, and that an Ordinance passed by the City, which prohibits the building of any structure or object into federal navigable airspace, is a legitimate exercise of the City's police power.

In 1962, the United States Supreme Court held that frequent low level flights over a person's property may constitute a taking, regardless of whether the airspace above the landowner's property constitutes federal navigable airspace. *See Griggs v. County of Allegheny,* 369 U.S. 84, 88-90 (1962). In *Griggs,* the approach area for one of the runways passed over the landowner's home; flights taking off passed from 30 feet to 300 feet over the residence, while flights landing traveled from 53 feet to 153 feet over the home. *See id.* at 87. The Court relied on *United States v. Causby,* 328 U.S. 256 (1945) to hold that flights through navigable airspace can constitute a compensable taking.

In *Causby,* the Court noted that airspace is a "public highway"; however,

> [I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise, buildings could not be erected, trees could not be planted, and even fences could not be run. . . . The superadjacent [sic] airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

328 U.S. at 265. The Court concluded that "the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it." *Id.* at 264. Thus, according to *Causby, Griggs,* and their progeny, a compensable taking by overflight may occur when frequent and low flights by aircraft cause direct, immediate, and substantial interference with the property owner's use and enjoyment of the land. *See Griggs,* 369 U.S. at 89-90; *Causby,* 328 U.S. at 266; *Brown v. United States,* 73 F.3d 1100, 1102 (Fed. Cir. 1996).

Texas cases have cited *Griggs* to find that low overflights may result in the taking of an air easement. In *City of Houston v. McFadden,* 420 S.W.2d 811 (Tex. Civ. App. – Houston [14th Dist.] 1967, writ ref'd n.r.e.), McFadden sued the City of Houston for taking his property as a result of the City's operation of Houston International Airport. The City constructed a new, longer runway for jet propelled aircraft after McFadden purchased his property

and built a home near the airport. The jet airplanes flew at low altitudes over McFadden's home when taking off and landing, causing physical damage to McFadden's home. The court of appeals, citing *Griggs,* noted, "This type of action has been recognized and approved as a 'taking' of property, in the constitutional sense, in the nature of an air easement for which compensation must be made." *McFadden,* 420 S.W.2d at 814; *see also Sjolander v. City of Houston,* 551 S.W.2d 166, 168 (Tex. Civ. App. – Houston 1977, no writ). More recently, the Texas Supreme Court has noted that this cause of action exists. *See Felts v. Harris County,* 915 S.W.2d 482, 486 (Tex. 1996) (distinguishing highway traffic noise case from "cases involving airplane overhead flights . . . [which] involve the 'taking' of air easements. . . . ") (citing *McFadden,* 420 S.W.2d at 814).

The City's argument that federal height restrictions have long burdened TCLC's land thus does not foreclose TCLC's claim that the City has taken its property by physically intruding into the airspace immediately above its land. We believe this conclusion is supported not only by case law but also by the federal agency imposing the height restrictions on the land. FAA Advisory Circular 150/5100-17 (the "FAA Advisory Circular") describes avigation easements and explains that such an easement may be used to "secure airspace for airport and runway approach protection." United States Department of Transportation, Federal Aviation Administration, *Land Acquisition and Relocation Assistance for Airport Improvement Program Assisted Projects,* Advisory Circular 150/5100-17

¶ 2-7(a) (March 29, 1996).[9] Paragraph 2-7(b) explains that "Avigation easements are typically acquired for airspace requirements . . . including the approach area." *Id.* ¶ 2-7(b). This FAA Advisory Circular supports our holding that, even though the airspace immediately over one's land may be federal navigable airspace because it is needed for safe takeoffs and landings, flights through such space may still constitute a taking for which compensation is due. The City's first issue is overruled.

The City alternatively claims that a previous owner was compensated for the height restrictions imposed by the Easement over TCLC's land. This argument also attempts to pigeonhole TCLC's overflights claim into a "taking by height restrictions" claim. We have explained above that federal and state case law permit a landowner to pursue a takings claim based on aircraft flying at low levels over its land. That is the claim TCLC alleged in its original petition and the claim before us in this appeal. We will therefore review whether TCLC's overflight complaint is barred by the Easement burdening its property.

The Easement begins by describing the federal "imaginary surfaces" over the subject property, specifically, the approach surface and the transition surface. It describes the manner in which these surfaces slope upward and lists

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[9] The FAA Circular explains that its purpose is to provide "guidance to sponsors of airport projects . . . to meet the requirements of the Uniform Relocations Assistance and Real Property Acquisition Act of 1970 (Pl 91-646, as amended) and the Regulations of the Office of the Secretary of Transportation, 49 CFR Part 24." The FAA Circular also states that "[s]ponsor land acquisition . . . shall comply [with 49 CFR Part 24] on any Federally assisted airport project funded" under the Airport Improvement Program.

and lists specifically the height of the imaginary surfaces over different parts of the subject property. The Easement then grants the following rights on and above the described land: (1) the right "to trim or remove" those portions of trees, bushes, shrubs, or any other perennial growth "infringing upon or extending into or above the approach zone plane and the transitional zone as described above"; (2) the same right for any growth "which could in the future" extend into the described surfaces; (3) the right to "remove, raze, or destroy" portions of buildings, other structures, or land extending into the described surfaces; (4) the right to "prohibit the future construction of buildings or other structures" from extending into the described surfaces; and (5) the right of "ingress and egress over said land to effect and maintain the necessary clearance." These five rights are referred to as an "obstruction" easement or a "clearance" easement. As we explained above, the Easement also provides military aircraft the right of unobstructed passage in all airspace above the surface of the subject property. This right is referred to as an "avigation" easement.

The City argues that the trial court failed to specify whether the City had taken an obstruction easement or an avigation easement. The trial court concluded, however, that "TCLC's superadjacent [sic] airspace rights were taken by *regular and frequent overflights*. . . . " (Emphasis added.) Thus, in the event that such a specific finding is necessary, the trial court clearly specified that the City took an avigation easement by virtue of civilian overflights. The City contends, however, that it is the height restrictions imposed by the obstruction easement that prevent TCLC from vertically expanding its landfill; therefore, the trial court erred by permitting TCLC to maintain a

takings claim on its theory that the avigation easement does not include the right to fly civilian operations over its land. We disagree. TCLC's takings claim is based on overflights. The City's obstruction easement does not give it overflight rights, and the avigation easement provides only military aircraft the right of unobstructed passage in the airspace above TCLC's land. *See Kearney & Son v. Fancher,* 401 S.W.2d 897, 905 (Tex.Civ.App. – Fort Worth 1966, writ ref'd n.r.e.) (limited easement restricted to stated purpose); *see also Jefferson County v. Farris,* 476 S.W.2d 457 (Tex. Civ. App. – Beaumont 1972, orig. proceeding) (explaining that obstruction easement and avigation easement are separate and independent of one another). The FAA Circular discussed above acknowledges that an airport operator may need to acquire both an avigation easement and an obstruction easement. *See* FAA Circular no. 150/5100-17 ("Where right of flight is required, lesser rights, such as clearance easements, are not sufficient to protect an airport owner from future claims of property owners due to over flights."). The City's third issue is overruled.

The City contends in issue five that its Ordinance restricting the airspace around the airport is a valid exercise of its police power and thus cannot constitute a taking as a matter of law. Pursuant to the Texas Local Government Code, the City has the right to adopt, administer, and enforce extraterritorial airport zoning.[10] The Ordinance at issue creates zones around the airport identical to

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[10] The City is authorized to zone the airport, which is outside of the City's boundaries, pursuant to the Airport Zoning Act. *See* Tex. Loc. Gov't Code Ann. §§ 241.001-.903 (West 1999).

the federal imaginary surfaces established by the FAA, and limits the height of structures and trees in these zones. *See* City of Austin Ordinance No. 940421-J.

With this issue, the City once again attempts to confine TCLC's takings claim to the height restrictions burdening its property. We have already stated that TCLC's complaint is based on repeated civilian overflights for which the City obtained no easement. The City's Ordinance, which imposes identical height restrictions on TCLC's land as the Easement and the federal imaginary surfaces, does not give the City the right to direct civilian flights at low levels over TCLC's land. The Local Government Code gives the City authority to obtain an air easement over TCLC's land if "airport zoning regulations are not sufficient to provide necessary approach protection because of constitutional limitations." Tex. Loc. Gov't Code Ann. § 241.903 (West 1999). The City simply failed to obtain an air easement in this case. Issue five is overruled.

We have overruled the City's contentions that the height restrictions burdening TCLC's property bar its takings claim. The City has urged in issues one and three, however, the slightly different argument that overflights have not decreased the fair market value of TCLC's land. In its reply brief, the City argues that the manner in which the property was appraised for trial was improper. In essence, these complaints attack the damages awarded to TCLC. The City did not object to the type of evidence presented by TCLC's real estate appraiser, did not object to the court's charge on the fair market value of the remainder, and has not raised an independent issue regarding damages on appeal. However, because the City argued in its motion for judgment notwithstanding the

verdict that overflights did not decrease the fair market value of TCLC's land and raises several arguments regarding whether overflights have decreased the fair market value of the land, we will address the damages question in the interest of completeness.

The City argues that the overflights have not caused TCLC the type of harm suffered by the plaintiffs in *Causby, Griggs,* and *McFadden.* In those cases, the landowners' homes were damaged and their sleep was interrupted, and the noise and proximity of the aircraft flying overhead rendered their homes virtually uninhabitable. In the instant case, TCLC has alleged that the overflights decreased the fair market value of its undeveloped property, which is permitted for a Type IV landfill. It has not claimed that the noise or vibrations from overflights have harmed the underlying property in any way.

Despite the difference between this case and earlier overflight cases, we hold that the trial court did not err in awarding TCLC damages on the facts before us in this case. Both the City and TCLC presented appraisers who testified that airport operations caused a decrease in the fair market value of TCLC's land for two reasons: TCLC's inability to vertically expand its landfill on one hand, but also the increased risk associated with operating a landfill in close proximity to a municipal airport.

In partial taking cases, damages are measured by the "difference between (a) the value of the landowner's entire tract before the taking, and (b) the market value of the remainder after the taking, giving consideration to the uses to which the condemned part is to be subjected." *Westgate, Ltd. v. State,* 843 S.W.2d 448, 457 (Tex. 1992). To determine the fair market value of the land before the

taking, the fact that the land will be taken must not be considered. *See City of Fort Worth v. Corbin,* 504 S.W.2d 828, 830 (Tex. 1974) ("The fact of condemnation itself is excluded; fair market value must, by definition, be computed as if there were no proceedings to eliminate that market."). The court in *Corbin* noted that this method involves a "hypothetical exercise." *Id.* at 830.

Holland Young, the Planning and Development Manager for the City's airport department, testified that under FAA guidelines the City was required to exclude consideration of the airport in valuing the property before the taking. Isabella Lauraine Rizer, the Chief Appraiser for the City's Real Estate Division, also testified that the City was required to adhere to federal guidelines for acquiring property for the airport, a federally funded project, and that one of those guidelines required the City to exclude from consideration the influence the project would have on the value of the land being taken.[11] She was asked, "And if it's an airport that['s] going to have – cause overflights that's going to damage the value of the property, you don't take that into account, do you?" Rizer responded, "No." The independent appraiser called by the City, David Bolton, also testified that, when determining the value of

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[11] Some of the federal guidelines referred to by both Young and Rizer are found in the previously mentioned FAA Advisory Circular, which states, "The appraisal of the property to be acquired shall disregard any decrease or increase in the fair market value of the real property caused by the project for which the property is to be acquired. . . . " United States Department of Transportation, Federal Aviation Administration, *Land Acquisition and Relocation Assistance for Airport Improvement Program Assisted Projects,* Advisory Circular 150/5100-17 ¶ 2-1(d) (March 29, 1996).

the subject property before the taking, the project charged with taking the property should be excluded from consideration.

We have explained earlier that both Bolton and TCLC's expert, Clint Sayers, testified that, excluding the existence of the airport and its operations, TCLC's property had a fair market value of $9,800,000. Both experts also testified that, immediately after the taking, the fair market value of TCLC's property decreased. Bolton, the City's expert, testified that the decrease was due to TCLC's inability to vertically expand its landfill and an increased risk factor resulting from possible environmental and technological changes, as well as higher insurance. Sayers's testimony was similar, but his valuation of the property included an even higher risk factor than Bolton's. Sayers cited as reasons for the increased risks such things as possible changes in FAA regulations, and the manner in which the landfill operator would have to oversee the landfill in light of its proximity to a municipal airport. Bolton valued the remainder at $7,500,000; Sayers valued the remainder at $6,200,000; the jury valued the remainder at $6,850,000.

At trial, the City's appraiser agreed that the project influence rule was to be followed in appraising TCLC's property, and he presented evidence that the fair market value of TCLC's land decreased when the City began operating the airport. Therefore, the City cannot argue that airport operations did not decrease the fair market value of TCLC's land, or that TCLC's evidence of the market value of its land before the taking, which excludes from consideration the existence of the airport, and its evidence of the value of the remainder, considering the use to which the land can be put with the airport in existence,

is the wrong way to estimate damages in this case. It is the very evidence the City itself presented.

We note finally that even without the height restrictions burdening TCLC's property, frequent low level overflights would prevent TCLC from stacking its landfill into the airspace over its land. In other words, if the FAA and the City suddenly removed all of the height restrictions currently affecting TCLC's land, TCLC would still maintain that overflights alone diminished the value of its property. Furthermore, the City has not challenged either appraiser's testimony regarding the heightened risk the landfill owner will face operating the landfill with 100 civilian aircraft flying over the landfill every day. Therefore, any challenge the City may have preserved regarding the damages awarded to TCLC is overruled.

***The Court's Charge to the Jury***

In the City's sixth issue, it complains that the trial court erred in submitting jury questions one and two. However, the City did not properly preserve at the trial court all the complaints embedded within this issue, nor has the City presented argument to support many of the complaints raised in the sixth issue.

In order to preserve error in the charge at the trial court, a party must either (1) object to the question, or (2) submit in writing to the trial court a substantially correct question, depending on whether the complaining party claims error in a question on which it relied or in a question relied on by its opponent. *See* Tex.R. Civ. P. 278. The City did not object to question two, which asked the jury to determine the fair market value of TCLC land on the date overflights began. There is no request for a substantially

correct version of question two in the record before us. Finally, the City presents no argument on appeal challenging any part of question two. *See* Tex.R.App. P. 38.1(h) (appellants' brief must contain argument for contentions made). Therefore, the challenge to question two is waived.

The City *did* object to question one, which is sufficient to preserve error regarding a defect in a question. *See* Tex. R. Civ. P. 272, 274. While the City's issue complains about the submitted question, however, the argument on appeal supporting this issue addresses only one of the three *instructions* accompanying question one:

**QUESTION NO. 1**[12]

Beginning on or about June 30, 1997, has the City of Austin taken TCLC's airspace rights by overflights associated with the operation of the Austin-Bergstrom International Airport?

Airspace rights are taken by overflight if:

. . . .

(2) the flights regularly occur at altitudes below the normal safe level of flight (500 feet in

[12] The dissent concludes that instruction three to Jury Question Number One misstates the law and probably caused the rendition of an improper judgment. Although the City objected to this instruction at the trial court, it does not present any argument on appeal relating to instruction three and none of its arguments on appeal address this instruction. *See* Tex.R.App. P. 38.1(h) (appellants' brief must contain arguments for contentions made). Therefore, we conclude that any complaint regarding instruction three is waived.

> uncongested areas, 1000 feet in congested areas);
>
> . . . .
>
> **Answer "Yes" or "No":**
>
> ANSWER: Yes

The City contends that instruction two is erroneous because it "misstate[s] the law and rest[s] on the faulty premise that federal navigable airspace cannot exist below an altitude of 500 feet." We do not believe the City has properly preserved this complaint because there is no record of any "substantially correct definition or instruction" submitted by the City to the trial court. *See* Tex.R. Civ. P. 278.[13] In the event this complaint has been preserved, however, we hold that the trial court did not abuse its discretion by submitting this instruction. *See Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (standard of review for jury charge is abuse of discretion). We have explained above that even though airspace below 500 feet may constitute federal navigable airspace, this does not eliminate a landowner's takings claim for overflights in that airspace. *See Griggs*, 369 U.S. at 87, 89; *Brown*, 73 F.3d at 1102 (court noted that the Browns' complaint was based on flights flying "less than 500 feet above ground level" over their property). While it may be preferable for a trial court to ask whether the flights occur at "low" altitudes, rather than at altitudes below the normal safe level of flight, the court did not act

[13] We note that the City's inclusion in its reply brief of an unfiled copy of its requested definitions or instructions cannot be considered because a filed copy of the same does not appear in the clerk's record.

without reference to guiding legal principles in submitting this charge. The City's sixth issue is overruled.

***Standing and Statute of Limitations***

In its second issue, the City argues that an obstruction easement placing height restrictions on the property was taken in the 1940s, when flights first began flying over the subject property, or in 1958, when Congress first defined the airspace over the subject property as federal navigable airspace. The City complains, therefore, that TCLC is not the proper party to bring this takings claim because only the owner of the property at the time of the original taking, either in the 1940s or 1958, is entitled to payment. In its fourth issue, the City argues that TCLC's takings claim is barred by the statute of limitations for the same reasons. These issues are not properly before this Court. First, they were not raised in the City's answer to TCLC's petition.[14] Furthermore, the City did not request a jury submission regarding the statute of limitations affirmative defense. *See* Tex.R. Civ. P. 279 (parties must submit questions regarding defenses in order to preserve error). The City's contention that it properly preserved these issues through its motion for judgment notwithstanding the verdict is without merit. Accordingly, issues two and four are overruled.

We have overruled all of the issues raised by the City in this appeal. Therefore, we affirm that part of the

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[14] The City did plead the affirmative defense of statute of limitations, but it asserted different dates in the 1990s as the start of the limitations period.

judgment finding the City liable to TCLC in the amount of $2,950,000. We now turn to the issues raised by TCLC in its role as appellant.

## II. TCLC's Appeal

### *TCLC's Request for Injunctive Relief*

In its motion for judgment on the verdict, TCLC requested the trial court to enjoin the City from directing or allowing commercial flights over its property until all monetary amounts awarded to TCLC were paid, or until the City deposited a security payable to TCLC into the registry of the Court. The trial court denied this request in the final judgment. TCLC now appeals the trial court's decision not to issue a permanent injunction against overflights pending final payment of the judgment.

Appellate review of a trial court judgment granting or denying a permanent injunction is strictly limited to a determination of whether there has been a clear abuse of discretion. *See Risk Managers Int'l, Inc. v. State,* 858 S.W.2d 567, 569-70 (Tex.App. – Austin 1993, writ denied); *Priest v. Texas Animal Health Comm'n,* 780 S.W.2d 874, 875-76 (Tex.App. – Dallas 1989, no writ). TCLC argues that the trial court abused its discretion by not issuing a permanent injunction in this case because it found that the City took TCLC's property yet refused to enjoin further physical possession of the property until the City compensated TCLC.

The Texas Constitution states:

> No person's property shall be taken, damaged or destroyed for or applied public use without adequate compensation being made, unless by the

> consent of such person; and *when taken,* except for the use of the State, *such compensation shall be first made, or secured by a deposit of money. . . .*

Tex. Const. art I, § 17 (emphasis added). Thus, the Texas Constitution requires a political subdivision of the State, such as the City, to compensate the landowner or deposit a security before it takes property for public use. In this case, the City did neither, and TCLC brought the instant inverse condemnation proceeding seeking compensation. When a party brings inverse condemnation proceedings against a political subdivision of the state, the political subdivision is permitted by statute to counterclaim and either assert a claim to the property or seek to condemn the property. *See* Tex. Prop. Code Ann. § 21.017 (West 1984). If the party seeks injunctive relief against the political subdivision, the trial court may grant the injunction or, instead of granting the injunction, "a court may require a condemnor to provide security adequate to compensate the property owner for damages that might result from the condemnation." *Id.* § 21.064.

In this case, the City did not assert a counterclaim to condemn the property, and in the final judgment, the trial court did not enjoin the City from further overflights. TCLC argues that by not asserting a counterclaim, the City abandoned its opportunity to provide a security deposit in lieu of being subjected to an injunction as provided by Property Code section 21.064. TCLC contends that because the trial court failed to issue a permanent injunction against overflights, the City has been rewarded for its failure to institute a lawful condemnation proceeding because it has not had to post a security deposit and it is not enjoined from further overflights. TCLC urges that

because it has prevailed in its takings claim against the City, denying its request for injunctive relief conditioned upon a security deposit offends the Texas Constitution by permitting the City to take TCLC's property rights without prior compensation.

Texas case law supports TCLC's position. In *Brazos River Conservation & Reclamation District v. Costello,* 143 S.W.2d 577 (Tex. 1940), the trial court enjoined the District from actions that would take the complaining landowner's property. The District filed a cross-action to condemn the subject property under the authority of article 3269, the predecessor statute to Property Code sections 21.017 and 21.064.[15] The District offered to pay a security into the registry of the court as the court might deem proper; the trial court determined a sum but nonetheless did not dissolve the injunction against the District. *Costello,* 143 S.W.2d at 578. The court of appeals affirmed the trial court's decision, holding that if article 3269 permitted the District to condemn by cross-action, the article was unconstitutional "because it would permit the dissolution of the injunction and the taking of properties" without providing for payment of damages, and it left to the discretion of the trial court whether any security should be deposited. *See id.* at 579. The court of appeals also held that "in no event should the State take the private property of individuals, leaving the owners to depend upon the discretion of a trial

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[15] *See* Tex.Rev.Civ. Stat. Ann. art. 3269 (West 1968), *repealed by* Act of May 24, 1983, 68th Leg., R.S., ch. 576, § 6, 1983 Tex. Gen. Laws 3475, 3729 (codified at Tex. Prop. Code Ann. §§ 21.017, .064 (West 1984)).

court as to the giving of security in advance of the taking." *Id.*

The supreme court reversed the court of appeals, holding that article 3269 should be read in connection with article I, section 17. *See id.* at 580. Construing it in this manner led to the conclusion that "the court, in the exercise of its power, *must require* that every prerequisite of the Constitution be fully complied with before a person's property can be applied to public use. The statute as thus construed does not violate the Constitution of this State." *Id.* (emphasis added). The court went on to hold that since the District was "ready, willing, and able" to deposit a security, "when said District has deposited in cash the sum allowed the landowners by said court . . . the said writ of injunction issued by the trial court shall be dissolved." *Id.*

In *Koslosky v. Texas Electric Service Co.,* 213 S.W.2d 853 (Tex.Civ.App. – Eastland 1948, writ ref'd), the court cited *Costello* when it stated: "Where property is taken, compensation therefor must be paid in advance or payment thereof secured. Unless such compensation is paid in advance, or unless Article 3269 . . . is complied with, an injunction should be issued to prevent such taking." *Id.* at 854-855.

In the cases discussed above, the injunctions were ordered to be dissolved once the taking entity posted a security deposit. *See Costello,* 143 S.W.2d at 580; *Koslosky,* 213 S.W.2d at 855. In this case, the entity charged with the taking is neither enjoined from further possession of the property nor is it required to deposit a security pending final resolution of the claim. We need not determine whether case law interpreting the Texas Constitution mandates the

trial court to issue an injunction in this situation, however, because we believe that federal law preempts any state law requirement that a permanent injunction issue to prohibit continued overflights.

To determine whether state law or judicial action conflicts with federal law, this Court must decide whether compliance with both state and federal law is impossible or whether the state law stands as an obstacle to the full objectives of Congress. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984). As we explained in our discussion of the City's appeal, the United States Code provides:

> **§ 40103. Sovereignty and use of airspace**
>
> **(a) Sovereignty and public right of transit.** – **(1)** The United States Government has exclusive sovereignty of airspace of the United States.

49 U.S.C.A. § 40103(a)(1) (West 1997). Congress has given the FAA authority to regulate flights through federal navigable airspace. *See id.* § 40103(b). Although the United States Supreme Court has given landowners the right to compensation when flights through superjacent airspace are so low and frequent as to constitute a taking, *see Griggs,* 369 U.S. at 89-90; *Causby,* 328 U.S. at 266, these cases do not extend to landowners the right to enjoin the overflights. *See United States v. City of New Haven,* 367 F.Supp. 1338 (D.Conn.1973) (holding that state court had no power to enjoin airport operations).

TCLC argues that federal regulations support its position that it is entitled to an injunction against continued overflights. FAA Order 5100.37A ("FAA Order") instructs an airport owner to "take the necessary action to file for condemnation" and states: "The airport owner shall not

intentionally make it necessary for the property owner to institute legal proceedings to prove the fact of the taking of the real property." United States Department of Transportation, Federal Aviation Administration, *Acquisition and Relocation Assistance for Airport Projects,* Order 5100.37A ¶ 3-34 (April 4, 1994). The FAA Order also states that "in the case of condemnation," the airport owner "shall . . . deposit with the court . . . the court award of compensation in the condemnation proceeding for the property." *Id.* We have also noted previously that FAA Advisory Circular 150/5100-17 instructs airport owners that avigation easements should be acquired for the approach area.

We agree that these federal guidelines instruct airport sponsors on the process to follow when acquiring needed property rights; however, the regulations do not manifest an intent that an airport sponsor be enjoined from directing flights through federal navigable airspace when the guidelines are not followed. The only intent we discern from federal law applicable to TCLC's request for an injunction is Congress's statement that the United States has exclusive sovereignty over the airspace. A Texas state court may not assume authority over the airspace by issuing an injunction against further overflights in light of this federal law. Thus, under the facts of this case, we decline to hold that the trial court abused its discretion by denying a permanent injunction against further flights through the airspace over TCLC's land. TCLC's first issue is overruled.

***Attorney's Fees***

The trial court denied TCLC's request for attorney's fees, stating in the judgment: "Attorney's fees and expenses are not awarded to Plaintiff due to the absence of statutory authority." In its second issue, TCLC contends this was error. We must disagree.

Recovery of attorney's fees is adverse to the common law and penal in nature, and statutes providing for such recovery must be strictly construed. *See New Amsterdam Cas. Co. v. Texas Indus. Inc.,* 414 S.W.2d 914, 915 (Tex. 1967); *Van Zandt v. Fort Worth Press,* 359 S.W.2d 893, 895 (Tex. 1962). Texas law provides no statutory authority for awarding attorney's fees in inverse condemnation claims arising under Article I, section 17 of the Texas Constitution. *See State v. Biggar,* 848 S.W.2d 291, 298 (Tex.App. – Austin 1993), *aff'd,* 873 S.W.2d 11 (Tex. 1994).

TCLC does not dispute the general rule. It argues, however, that relevant federal law provides the statutory authority allowing it to recover attorney's fees under its state inverse condemnation claim, citing the Uniform Relocation Assistance and Real Property Act ("Uniform Act"), 42 U.S.C.A. §§ 4601-4655 (West 1995). The Uniform Act is a federal statute that provides for the recovery of litigation expenses, including attorney's fees, by plaintiffs who instigate inverse condemnation proceedings under section 1346(a)(2) or 1491 of Title 28[16] of the United States Code. The relevant section states:

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[16] 28 U.S.C.A section 1346(a)(2) provides that federal district courts have original jurisdiction, concurrent with the United States Court of Federal Claims, over certain civil actions against the United States,

(Continued on following page)

**§ 4654. Litigation expenses**

. . . .

**(c) Claims against the United States**

> The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, . . . shall determine and award or allow to such plaintiff, as a part of such judgment . . . such sum as will . . . reimburse such plaintiff for his reasonable costs; disbursements; and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C.A. § 4654.

Thus, section 4654 provides authority for the award of attorney's fees and expenses in actions brought in either federal court or the Court of Federal Claims. The Uniform Act contains no express authority for a similar award for state causes of action filed in state court. Further, the federal regulation implementing the Uniform Act, cited by TCLC as supporting its claim, likewise provides no express grant of authority. The relied upon regulation states:

**24.107 Certain litigation expenses.**

> The owner of real property shall be reimbursed for any reasonable expense, including reasonable

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while section 1491 provides that the Court of Federal Claims has jurisdiction to render judgment upon any claim against the United States founded upon, among other things, the federal constitution. *See* 28 U.S.C.A. §§ 1346(a)(2), 1491 (West 1994 & Supp. 1998).

> attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:
>
> . . . .
>
> (c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

49 C.F.R § 24.107 (1998). The regulations define the term "Agency" as "the Federal Agency, State, State agency, or person that acquires real property," while the term "State agency" is defined as, among other things, "a political subdivision of a State." *Id.* § 24.2(a), (a)(1). At most, section 24.107 clarifies that section 4654 applies to governmental entities facing claims in federal court or the Court of Federal Claims. It does not provide statutory authority for state courts to award attorney's fees for successful inverse condemnation claims arising under state law.

Only one other statutory provision might be construed as authorizing the award of attorney's fees, that being section 4655, which provides:

> **§ 4655. Requirements for uniform land acquisition policies**
>
> **(a) Payments of expenses incidental to transfer of real property to State**[17]
>
> Notwithstanding any other law, the head of a Federal agency shall not approve any program or

[17] "State" is defined as, among other things, "any political subdivision" of any State of the United States. 42 U.S.C.A. § 4601 (West 1995).

> project or any grant to . . . an acquiring agency[18] under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property . . . unless he receives satisfactory assurances from such acquiring agency that –
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 . . . and . . . section 4652 of this title.[19]
>
> (2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

42 U.S.C.A. § 4655 (emphasis added). By its terms, the Uniform Act prohibits a federal agency from approving any federally funded project in which a political subdivision of a state acquires real property without assuring that the acquiring political subdivision will (1) follow the land acquisition policies of the Uniform Act, to the extent possible under State law; and (2) reimburse property owners for litigation expenses should the property owner be forced to institute inverse condemnation proceedings.

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[18] "Acquiring agency" is defined as a State agency that has the authority to acquire property by eminent domain under State law. 42 U.S.C.A. § 4655(b) (West 1995). A "State agency" is defined by the statute as, among other things, "a political subdivision of a State." *Id.* § 4601.

[19] Section 4651 requires Federal agencies to exclude from consideration any increase or decrease in the fair market value resulting from the public project for which the property is to be taken. *See* 42 U.S.C.A. § 4651 (West 1995).

Thus, section 4655 governs the relationship between the City and the federal agency from which it seeks federal funds. It does not create a landowner's cause of action for attorney's fees in the event the City fails to comply with the land acquisition policies outlined in the statute. *See City of Buffalo v. Clemente,* 360 N.Y.S.2d 362, 366 (1974) (holding that section 4655 prescribes conduct between federal agencies and state agencies in condemnation actions involving federal funds).

Because we find no statutory authority for an award of attorney's fees or litigation expenses in TCLC's state inverse condemnation claim, the trial court did not err by refusing to award them. TCLC's second issue is overruled.

## CONCLUSION

We have overruled the City's and TCLC's issues. The trial court judgment is affirmed.

Marilyn Aboussie, Chief Justice

Before Chief Justice Aboussie, Justices Kidd and Patterson

Affirmed

Filed: August 26, 1999

Publish

NO. 97-07362

| | | |
|---|---|---|
| TRAVIS COUNTY LANDFILL COMPANY, Plaintiff | § | IN THE DISTRICT COURT OF |
| VS. | § | OF TRAVIS COUNTY, TEXAS |
| THE CITY OF AUSTIN, Defendant | § | 201ST JUDICIAL DISTRICT |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 1, 1998, the parties and their attorneys appeared and announced ready for trial. A jury was impaneled, heard the evidence and argument of Counsel, and received the Charge of the Court. On June 5, the jury returned its verdict, including findings of liability for a taking, damages to Plaintiff's property, and reasonable attorney's fees and expenses. The Court found that the verdict was supported by the evidence and entered Final Judgment in this case. On the request of Plaintiff, the Court makes the following findings of fact and conclusions of law in the event the appellate court determines the issue of whether a taking occurred was a question of law for the Court.

### Findings of Fact

1. Plaintiff, Travis County Landfill Company, L.L.C. ("TCLC"), owns approximately 135 acres immediately south of the new Austin-Bergstrom International Airport ("ABIA").

2. Beginning on or about June 30, 1997, the City of Austin has interfered with TCLC airspace rights in conjunction with the operation of ABIA.

3. Flights through TCLC's airspace from ABIA are frequent and recurring and are not isolated or sporadic.

4. Flights through TCLC's airspace from ABIA regularly occur at altitudes below the normal safe level of flight (500 feet in uncongested areas, 1000 feet in congested areas).

5. Flights through TCLC's airspace from ABIA result in a substantial interference with TCLC's ability to use and enjoy its property and result in a substantial decrease in the market value of the property.

6. These flights will continue to occur regularly and with increased frequency for the foreseeable future.

## Conclusions of Law

Based upon the preceding findings of fact, the Court makes the following conclusions of law.

1. Beginning on or about June 30, 1997, TCLC's superadjacent airspace rights were taken by regular and frequent overflights conducted in connection with the operation of ABIA.

2. TCLC is entitled to compensation for the taking of its property in the amount found by the jury.

SIGNED this 14 day of July, 1998.

/s/ Suzanne Covington
SUZANNE COVINGTON
Judge Presiding

[SEAL] THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

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May 30, 2002

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RE: Case Number: 00-0944
Court of Appeals Number: 03-98-00455-CV
Trial Court Number: 97-07362

Style: CITY OF AUSTIN
v.
TRAVIS COUNTY LANDFILL COMPANY, L.L.C.

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing in the above referenced cause.

John T. Adams, Clerk
by /s/ Patricia A. Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

---

## DEED OF EASEMENT

This indenture made this 5th day of April 1982, by and between Robert B. Thornton, Charles L. Bruchmiller, John D. Cochran, Merle H. Boeck and Arvin A. Stewart, and their heirs, executors, administrators, successors and assigns (hereinafter referred to as the Grantors), and the United States of America, and its assigns:

WITNESSETH

That the Grantors for and in consideration of the sum of Fifty-nine Thousand Dollars ($59,000.00), the receipt and sufficiency of which is hereby acknowledged, hereby grant, bargain, sell, and convey unto the United States of America and its assigns, a perpetual and assignable easement as set forth below under the following described parcel of land consisting of 223 acres, more or less:

TRACT NO. 79E

A tract of land situated in the County of Travis, State of Texas, being part of the Garner Mays Survey (A-530), part of the Santiago Del Valle Ten League Survey (A-24), and part of the J. Bittick Survey (A-54), and being within the southerly approach-departure zone and in the easterly transition zones for runway 35L, and within the approach-departure zone for runway 35R at Bergstrom Air Force Base. The approach-departure surface starts at a point 200 feet from the end of the runway measured on the projection of the runway center line. The approach-departure surface of the approach-departure zone slopes upward to the south at the rate of 1 foot vertically to 50 feet horizontally and the easterly transition surface slopes

upward to the east at the rate of 1 foot vertically to 7 feet horizontally and the elevations noted at designated points regulate the maximum height of objects on the following described tract of land:

BEGINNING at the corner common to the Charles L. Bruchmiller, et al, property and the Capitol Cattle Company property, situated in a northwesterly boundary line for the T.C. (Buck) Steiner property, said point of beginning having a permissible height of 76 feet above existing ground or to elevation 613 feet, mean sea level;

THENCE along the common line between said Bruchmiller and Capitol Cattle Company properties as follows: north 66°49' west, 1190.82 feet to a point for a re-entrant corner for said Bruchmiller property, said point having a permissible height of 74 feet above existing ground or to elevation 603 feet, mean sea level;

THENCE south 14°55' west, 839.44 feet to a point for a re-entrant corner for said Capitol Cattle Company property, said point having a permissible height of 89 feet above existing ground or to elevation 620 feet, mean sea level;

THENCE north 71°33' west, 24.52 feet to a point for a re-entrant corner for said Capitol Cattle Company property, said point having a permissible height of 89 feet above existing ground or to elevation 620 feet, mean sea level;

THENCE north 71°35' west, 263.77 feet to a point for a re-entrant corner for said Capitol Cattle Company property, said point having a permissible height of 74 feet above existing ground or to elevation 618 feet, mean sea level;

THENCE north 45°58' west, 154.22 feet to a point for a re-entrant corner for said Bruchmiller property, said point having a permissible height of 93 feet above existing ground or to elevation 615 feet, mean sea level;

THENCE north 60°19' west, 72.14 feet to a point for a re-entrant corner for said Bruchmiller property, said point having a permissible height of 92 feet above existing ground or to elevation 614 feet, mean sea level;

THENCE north 78°32' west, 50 feet to a point for a re-entrant corner for said Bruchmiller property, said point having a permissible height of 92 feet above existing ground or to elevation 614 feet, mean sea level;

THENCE south 75°26' west, 442.06 feet to a point for a northwest corner for said Capitol Cattle Company property, said point having a permissible height of 84 feet above existing ground or to elevation 616 feet, mean sea level;

THENCE south 06°16' west, 190.12 feet to a point for a re-entrant corner for said Bruchmiller property, said point having a permissible height of 88 feet above existing ground or to elevation 620 feet, mean sea level;

THENCE south 13°28' east, 468 feet to a point, said point having a permissible height of 100 feet above existing ground or to elevation 630 feet, mean sea level;

THENCE departing from said common line, south 36°10' west, 320 feet to a point having a permissible height of 100 feet above existing ground or to elevation 630 feet, mean sea level;

Thence south 32°15' west, 330 feet to a point in the northerly right-of-way line for FM Highway No. 812, said

point being situated in the southermost boundary line for said Bruchmiller property, and having a permissible height of 100 feet above existing ground or to elevation 641 feet, mean sea level;

THENCE along the southermost boundary line for said Bruchmiller property, same being the northerly right-of-way line for said FM Highway 812, north 62°00' west, 692 feet, more or less, to a point for the corner common to said Bruchmiller and the City of Austin properties, and having a permissible height of 84 feet above existing ground or to elevation 634 feet, mean sea level;

THENCE along the common line between said Bruchmiller and City of Austin properties as follows: north 29°30' east, 1701.97 feet to a point for the easternmost corner for said City of Austin property, said point having a permissible height of 73 feet above existing ground or to elevation 604 feet, mean sea level;

THENCE north 60°30' west, 600 feet to a point for the northermost corner for said City of Austin property, said point having a permissible height of 64 feet above existing ground or to elevation 599 feet, mean sea level, said point also being the corner common to tracts designated as Tracts Nos. B-205E, 206E, and 76E for Bergstrom Air Force Base;

THENCE departing from said common line, along the common line between said Bruchmiller property on the right and said Tract No. 76E and a tract designated as Tract No. 87 for Bergstrom Air Force Base, north 29°30' west, 3125 feet to a point for the corner common to said Bruchmiller property, Tract No. 76E, and tracts designated as Tracts Nos. 401-1 and 400 for Bergstrom Air Force Base, Texas, said point having a permissible height of 35

feet above existing ground or to elevation 544 feet, mean sea level;

THENCE along the common line between said Bruchmiller property and Tract No. 400, north 88°59' east, 551 feet to a point for the southeast corner for said Tract No. 400;

THENCE along the boundary line for a tract of land designated as Tract No. 91E for Bergstrom Air Force Base as follows: north 88°59' east, 392 feet, more or less, to a point, said point being vertically below the intersection of the approach-departure zone with the easterly transition zone for said runway 35L, said point having a permissible height of 83 feet above existing ground or to elevation 544 feet, mean sea level;

THENCE continuing north 88°59' east, 308 feet to a point, said point vertically below the intersection of the easterly transition zone for said runway 35L with the approach-departure zone for runway 35R for said Bergstrom Air Force Base, said point having a permissible height of 136 feet above existing ground or to elevation 587 feet, mean sea level;

Thence continuing north 88°59' east, 149 feet, more or less, to a point for the southeast corner for said Tract No. 91E, said point having a permissible height of 137 feet above existing ground or to elevation 587 feet, mean sea level;

THENCE north 01°01' west, 680 feet, more or less, to a point for the northeast corner for said Tract No. 91E, situated in the southerly right-of-way line for Burleson Road, said point having a permissible height of 113 feet

above existing ground or to elevation 574 feet, mean sea level;

THENCE departing from the boundary line for said Tract No. 91E, along the northerly boundary line for said Bruchmiller property, same being the southerly right-of-way line for said road, in a southeasterly direction 75 feet, more or less, to a point, said point having a permissible height of 113 feet above existing ground or to elevation 575 feet, mean sea level;

THENCE south 08°08' east, 980 feet to a point in the common line between said Bruchmiller property and the W.J. Cutbrith property, said point having a permissible height of 140 feet above existing ground or to elevation 595 feet, mean sea level;

THENCE along the common line between said Bruchmiller and Cutbrith properties as follows: south 24°50' west, 390 feet, more or less, to a point in the center line for Onion Creek for a re-entrant corner for said Bruchmiller property, said point having a permissible height of 152 feet above existing ground or to elevation 602 feet, mean sea level;

THENCE downstream with the meanders of the center line for said Onion Creek, in a southeasterly direction 450 feet, more or less, to a point, said point having a permissible height of 174 feet above existing ground or to elevation 609 feet, mean sea level;

THENCE departing from said common line, south 08°08' east, 1170 feet, more or less, to a point in the common ine between said Bruchmiller property and the T.C. (Buck) Steiner property, said point having a permissible height of 137 feet above existing ground or to elevation

632 feet, mean sea level, said point also being the northernmost corner for a tract of land designated as Tract No. 78E for Bergstrom Air Force Base;

THENCE along the common line between said Bruchmiller and Steiner properties, same being the boundary line for said Tract No. 78E as follows: south, 655 feet to a point for a southeast corner for said Bruchmiller property, said point having a permissible height of 119 feet above existing ground or to elevation 644 feet, mean sea level;

THENCE south 83°00' west, 158.60 feet to a point, said point being vertically below the intersection of the approach-departure zone for said runway 35R with the easterly transition zone for runway 35L, said point having a permissible height of 154 feet above existing ground or to elevation 644 feet, mean sea level;

THENCE continuing south 83°00' west, 167 feet to a northwesterly corner for said Steiner property, said point having a permissible height of 99 feet above existing ground or to elevation 625 feet, mean sea level;

THENCE south 23°05' west, 280 feet, more or less, to a point, said point being vertically below the intersection of the approach-departure zone with the easterly transition zone for said runway 35L, said point having a permissible height of 74 feet above existing ground or to elevation 606 feet, mean sea level;

THENCE continuing south 23°05' west, 392 feet, more or less, to the point of beginning, containing 223.00 acres, more or less, of which 1.64 acres are included in the description of Tract No. 65E, 1.25 acres, of which 0.01 acre is included in the description of Tract No. 90E, are

included in the description of Tract No. 88E, and being part of the same land conveyed to Charles L. Bruchmiller, et al, by Capitol Cattle Company by deed dated 4 April 1974 and recorded in Volume 4960 at Page 2249 of the Deed Records of Travis County, Texas.

The easement and rights hereby granted consist of the following rights on and above the described lands:

(1) The continuing perpetual rights to trim or remove only those portions of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon or extending into or above the approach zone plane and the transitional zone as described above.

(2) The continuing perpetual right to trim or remove only those portions of the growth of such trees, bushes, shrubs or any other perennial growth or undergrowth which could in the future infringe upon or extend into or above the approach zone plane and the transitional zone as described above.

(3) The right to remove, raze, or destroy those portions of building, other structures, and land extending into or above the approach zone plane and the transitional zone as described above.

(4) The right to prohibit the future construction of buildings or other structures from infringing upon or extending into or above the approach zone plane and the transitional zone as described above.

(5) The right of ingress and egress over said land to effect and maintain the necesary clearance.

In addition to the rights described above, Grantors convey the right of unobstructed passage of all military

aircraft and aircraft operated under military control (aircraft being defined for the purpose of this instrument as any contrivance now known or hereafter invented, used or designed for navigation or flight in the air) in all air space above the surface of Grantors' property, the number of passages not to exceed 60,900 per year; together with the right to cause in all air space above the surface of Grantors' property such noises, vibrations, fumes, fuel particles, and such other related effects as may result from the operation of aircraft landing at, taking off from, or operating at or on Bergstrom Air Force Base, notwithstanding the extent of interference which such noises, vibrations, fumes, fuel particles, and such other related effects, may cause to the use of Grantors' remainder estate.

Grantors agree to hold the United States and its assigns harmless for any claim by grantors for interference with the use and enjoyment of property located beneath the property described above which interference is caused by the passage of aircraft operating within the scope of this easement.

The Grantors reserve to themselves, their heirs, executors, administrators, successors and assigns all right, title, interest and privileges as may be exercised and enjoyed without interference with or abridgment of the easement and rights hereby granted or granted by separate conveyance.

The Grantors covenant and agree with the United States of America and its assigns that Grantors will pay all taxes and assessments on said land promptly when due so long as they may own said property and Grantors will

warrant and defend said easement and rights against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, the Grantors have hereunto set their lands and seals the day, month and year first above written.

/s/ Robert B. Thornton
ROBERT B. THORNTON

/s/ Charles L. Bruchmiller
CHARLES L. BRUCHMILLER

/s/ John D. Cochran
JOHN D. COCHRAN

/s/ Merle H. Boeck
MERLE H. BOECK

/s/ Arvin A. Stewart
ARVIN A. STEWART